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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 361

ARMAND EDWARD BLACKMAR,

Petitioner,

versus

L. F. GUERRE, MANAGER, VETERANS ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA, AND UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

MEMORANDUM OF PETITIONER IN REPLY TO RESPONDENT'S SUPPLEMENTAL MEMORANDUM.

RENÉ R. NICAUD,
HUGH H. BRISTER,
CONRAD MEYER III,
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HAUSER PRINTING CO., INC., NEW ORLEANS

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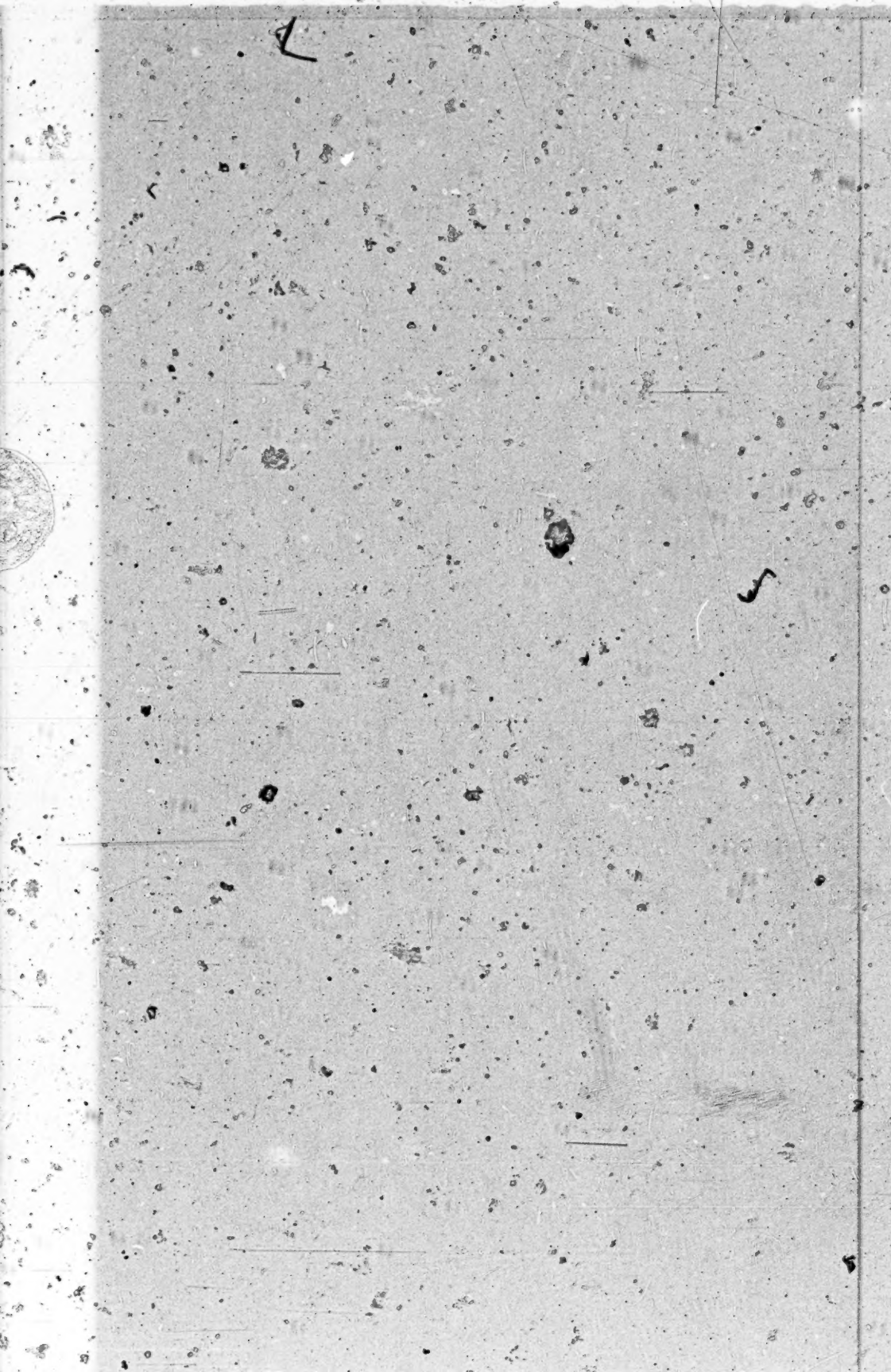

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MEMORANDUM OF PETITIONER IN REPLY TO RESPONDENT'S SUPPLEMENTAL MEMORANDUM.

In its presentation of this case the Government has conspicuously ignored the following provision of Section 1 of the Administrative Procedure Act:

5 U.S.C.A. Sec. 1001. "Definitions"

"As used in this chapter * * *"

Agency

"(2) 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the government of the possessions, Territories,

or the District of Columbia" * * * (Emphasis ours)

The impact of this provision cannot be thus avoided. Section 10 of the Administrative Procedure Act provides in effect that every[1] final agency action is subject to judicial review in any court of competent jurisdiction. Section 1, *supra*, defines "agency" as "each authority of the Government of the United States". The question then as to whose act is subject to judicial review is expressly and unmistakably answered as that of the sovereign. Unless we are to pervert the clear meaning of the plain words of the English language the conclusion is inescapable that by this act, Congress recognized the responsibility of the United States Government for the arbitrary or unlawful acts of its administrative agencies and consented to action for the judicial review and redress thereof in its courts.

Even under a strict construction the explicitness of the above provisions should leave no doubt but that sovereign consent has been granted for the judicial review of administrative proceedings. The jurisprudence, however, is clear that such provisions should be liberally construed. "The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced." *United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S. Ct. 399; *Keifer and Keifer v. R. F. C.*, 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 748; *Federal Housing Administration v. Burr*, 309 U.S. 242, 60 S. Ct. 488, 84 L. Ed. 724; *R.*

[1] Such exceptions as may exist are not pertinent to this case. Nor is the scope of judicial review at issue at this stage. It is conceded that a judiciable controversy is presented. It should be noticed, however, that the scope of judicial review is expressly set forth in Section 10 (e), 5 U.S.C.A. 1009 (e) of the Administrative Procedure Act, which includes, but is clearly not limited to, failure to observe required procedure.

F. C. v. J. G. Menihan Corp., 312 U.S. 81, 61 S. Ct. 485, 85 L. Ed. 595. And the contention that this rule applies only when the instrumentality is a corporation in the strict commercial sense of incorporation under some type of charter, is without reason or merit. For example, this Court has applied the rule of liberal construction of waiver of sovereign immunity to the Federal Housing Administration which is not incorporated, *Federal Housing Administration v. Burr, supra*, and held in that case, that suit could be maintained against the Federal Housing Administration, as such, though the act provided for suit against the Administrator. Nor are any special words such as "sue and be sued" [2] required to evidence sovereign consent. " * * * such a clause is not a ritualistic formula which alone can engender liability. * * * " *Keifer & Keifer v. R. F. C., supra.* Irrespective, therefore, of whether the Civil Service Commission is a legal entity or not, since sovereign consent so patently exists, the district court would have jurisdiction and venue of this action as one against the United States Government.

The Civil Service Commission is a legal entity. This is clear from the statutes on the subject. The Veterans Preference Act, as well as the Hatch Act refer in the same manner to the Commission as a body. No reference is made in the Veterans Preference Act to the Commissioners or to the individual members of the Commission.[3] The legal entity status is not limited to

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[2] Although these words do not appear in the Administrative Procedure Act, neither are they used in the Hatch (Political Activities) Act, 5 U.S.C.A. 118 (i)-118 (n), which the Government, with considerable inconsistency, recognizes as authorizing suit against the Commission.

[3] For example, Sec. 14 of the Act, 5 U.S.C.A. 863, includes the provision:

> * * * "the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends. * * * "

corporations in the strict commercial sense or to those that exist by virtue of charters of some type, such as the Reconstruction Finance Corporation. Thus the following have been held to be legal entities or government corporations: The Interstate Commerce Commission, *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, 162 U.S. 197, 16 S. Ct. 666; the Federal Housing Administration, *Federal Housing Administration v. Burr, supra; Seven Oaks, Inc. v. Federal Housing Administration, et al*, 171 F. 2d 947; The Railroad Labor Board, *Robertson v. Railroad Labor Board*, 268 U.S. 619, 45 S. Ct. 621; the National Relations Board, *Bradley Lumber Company of Arkansas, et al v. National Labor Relations Board*, 84 F. 2d 97. The Civil Service Commission itself recognizes that it is a legal entity and initiated judicial proceeding as such in the District Court for the Middle District of Tennessee. See *Wages, et al v. United States Civil Service Commission*, 170 F. 2d 182. In fact the Fifth Circuit Court of Appeals in its decision recognizes that the Civil Service Commission is a suable entity as sued in this case. Authority to sue or be sued is not essential for the entity status, but the Administrative Procedure Act does clearly authorize actions against each authority of the United States Government for the purpose of judicial review. There is no basis, therefore, for the contention that when the Administrative Procedure Act provides for the judicial review of the Commission's administrative acts, as an authority of the United States Government, the action should be brought against the individuals rather than against the Commission as a body.

Several pages of the Government's supplemental memorandum are expended to show that the Hatch Act provided expressly for the judicial review of the Civil

Service proceedings involving State employees in activities financed by the United States Government, but made no such provision as to Federal employees. The Government ignores completely, however, the fact that this serious defect, pointed out by Senator Norris in the quotation in its supplemental memorandum, was cured by the subsequent enactment of the Administrative Procedure Act, the provisions of which now afford judicial review to all aggrieved employees.

Obviously, the question is not whether the Hatch Act affords petitioner judicial review, but whether in bringing an action for judicial review under the Administrative Procedure Act, the Civil Service Commission should be considered a different being, than it is in an action for judicial review under the Hatch Act. It is true that the Administrative Procedure Act does not list by name the numerous administrative agencies covered by its generic provisions. It covers them all and in this respect differs from the Hatch Act which deals only with the Civil Service Commission. The Hatch Act is in *pari materia*, however, with the Administrative Procedure Act insofar as the latter applies to the Civil Service Commission; and in determining whether Congress considers the Commission a legal entity it is proper to consult the Hatch Act and to be guided by its provisions. Certainly Congress did not intend the anomalous situation, for which the Government now contends, namely, that the Civil Service Commission when sued by State employees for judicial review under the Hatch Act should be sued as an entity, but when Federal employees sued the same authority under the judicial review provisions of the Administrative Procedure Act, the action must be brought against the individual members. This "is to infer Congressional idiosyncrasy". *Keifer and Keifer*

v. R. F. C., supra (306 U.S. pg. 393). None of the authorities cited by the Government support this absurd proposition.

Service of Process from a district court is not effective beyond the territorial limits of the State in which it is held, Rule 4 (f) of the Federal Rules of Civil Procedure. The Hatch Act authorizes the bringing of the review action at the plaintiff's residence, but makes no provision for extra-territorial service. Therefore, when it requires service of the petition for review on the Commission, Congress necessarily shows that it considers the Commission present and subject to service in each of the United States.

The Administrative Procedure Act has been heralded as a Bill of Rights for American citizens against the abuses of administrative agencies of the Federal Government. It was intended to afford effective judicial redress against these abuses. If the Government's construction is placed upon this act, and the only available forum is in the District of Columbia, the vast majority of people cannot obtain redress because of the remoteness of the Court. Laws are not to be construed so as to perpetuate the rigidities and technicalities they were designed to eliminate. They are to be construed so as to effectuate, rather than frustrate their purpose.

Respectfully submitted,

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February 1952.